**Murray-Aynsley, J.**—In this case the Magistrate acquitted the respondent at the close of the case for the prosecution. I think he acted prematurely. There was evidence which if unrebutted would have justified a conviction. When the respondent has been heard it is quite possible that a satisfactory explanation may be given; but it is not part of the duty of a Court at an early stage in the proceedings to anticipate possible defences, and then to act as though these defences had been established.

*Appeal allowed.*

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[APPELLATE CRIMINAL JURISDICTION]
MURRAY-AYNSLEY, J.
December 15, 1939.

## BABU SINGH v. PUBLIC PROSECUTOR.

[PERAK MAGISTRATE'S CRIMINAL APPEAL No. 88 of 1939]

*Sanitary Boards By-laws, By-law 18 of Part VI C —carrying on trade of dairy-man without licence—conviction—power of Court to order confiscation.*

The appellant rode through the streets of Taiping on a bicycle, on the back of which was a large receptacle containing milk. He stopped at a coffee-shop and delivered milk from the receptacle. He had no licence. On a charge of carrying on the trade of a dairyman without licence he was convicted.

**Held,** that the appellant, notwithstanding the absence of evidence of sale, was a "dairy-man" as defined in By-law 18 of Part VI C made under the Sanitary Boards Enactment (Cap. 137) and was therefore rightly convicted.

**Held also,** that under section 407 of the Criminal Procedure Code the Magistrate had power to order a confiscation of some of the implements used by the appellant in connection with the offence with which he was charged.

**Tan Hoon Swee v. Public Prosecutor** (1) not followed.

Case referred to:—

(1) *Tan Hoon Swee v. Public Prosecutor,* 6 F.M.S.L.R. 191.

MAGISTRATE'S CRIMINAL APPEAL.

*J. S. Chabra* for the Appellant.

*T. V. A. Brodie,* Assistant Legal Adviser, for the Public Prosecutor (Respondent). "Dairy-man" is defined in By-law 18 of Part VI C (Cap. 137) as a "purveyor or seller of milk or occupier of a dairy and shall include the employees thereof engaged in the distribution or sale of milk." On the evidence before the Magistrate he was entitled to come to the conclusion that a man acting in the way described by witnesses and carrying so large a quantity of milk was "a purveyor or seller of milk" and was carrying this on as a trade. The explanation offered of the admitted delivery of milk to certain witnesses was inconsistent with many facts proved by the prosecution as well as with probability.

As regards the minor point of forfeiture, the case of *Tan Hoon Swee v. Public Prosecutor*[1] is not binding on a F.M.S. Court. The wording of the section as reported in that case differs widely and materially from that in S. 407 (ii) of the Criminal Procedure Code. The decision runs violently counter to the plain words of the Code.

**Murray-Aynsley, J.**—In this case the appellant was charged with carrying on the trade of a dairy-man without a licence.

It is not disputed that the appellant had no licence. By-law 18 of Part VI C made under Cap. 137 gives a definition of a dairy-man.

In the Court below and before me the main controversy was whether there was evidence of a sale. I do not think that a sale concludes the matter one way or the other.

Here it was proved that the appellant rode through the streets of Taiping on a bicycle, on the back of which was a large receptacle containing milk. He stopped at a coffee shop and delivered milk from this. These receptacles are a common sight in the F.M.S. and are the local equivalent of a milk-float.

The Magistrate not unnaturally disbelieved the appellant when he said that he conveyed the milk in that way for his tea and convicted the appellant. I think that the conviction was right.

A further point arises out of the order for the confiscation of some of the implements used by the appellant. This order was made under Section 407 of the Criminal Procedure Code. It has been contended that this order is *ultra vires;* this contention was based on the Johore case of *Tan Hoon Swee v. Public Prosecutor,*[1]. That case held that the section gives no power of forfeiture but merely regulates the exercise of such power when it is conferred by some other enactment.

I am unable to see anything in the words of the section which should so limit the power of the Magistrate and further such an interpretation seems to be excluded by the final words of sub-section (ii). That authority is not binding on me and I do not follow it.

*Appeal dismissed.*